theory that since the possession of the trustee is for the benefit of the general creditors, the latter will be entitled to the rents, unless a receiver for the benefit of the mortgagee is appointed, and it would seem, therefore, that the position of these courts is unsound. The trustee is an officer of the court, *Crosby* v. *Spear* (1904) 98 Me. 542, 57 Atl. 881, invested with possession of the property by operation of law, 30 Stat. 565, 9 U. S. Comp. Stat. (1916) § 9654, and he has other functions besides protecting the general creditors. *In re Industrial, etc. Co.* (D. C. 1908) 163 Fed. 390. On principle, the trustee as a court officer should make the most equitable disposition of the rent without the interposition of the receiver for the benefit of the mortgagee, *In re Industrial, etc. Co., supra*; see *In re Torchia* (C. C. A. 1911) 188 Fed. 207, and, therefore, the holding of the instant case is sound.

NEW TRIAL—GRANTING UPON CONDITION—NEWLY DISCOVERED EVIDENCE. —After verdict for the plaintiff, defendant moved for a new trial on the ground of newly discovered evidence, submitting an affidavit by one of the plaintiff's important witnesses at the first trial to the effect that he, the affiant, had then committed perjury. It appeared that this witness and his family had been supported financially by the defendant since the trial and that the witness has left the state under pressure of indictment by defendant. *Held*, two judges dissenting, a new trial would be granted upon condition that plaintiff be allowed to read the former testimony of this witness before a submission of the subsequent affidavit. *Fried* v. *New York N. H. & H. R. R.* (2nd Dept. 1917) 178 App. Div. 309, 165 N. Y. Supp. 495.

The granting of a motion for a new trial, where it is not sought as a statutory right or on the ground of error made in the law, lies within the discretion of the trial judge, whether it be sought on the ground that the verdict is contrary to the evidence, *Thompson* v. *Warren* (1903) 118 Ga. 644, 45 S. E. 912, or on the ground either of interference with the jury, *Chicago Junction Ry.* v. *McGrath* (1903) 107 Ill. App. 100, aff'd. 203 Ill. 511, 68 N. E. 69, or of newly discovered evidence. *Parsons* v. *Lewiston, etc. Ry.* (1902) 96 Me. 503, 52 Atl. 1006; *Whitehead* v. *Breckenridge* (1904) 5 Ind. Terr. 133, 82 S. W. 698; *Bunker* v. *United Order of Forester* (1906) 97 Minn. 361, 107 N. W. 392. Unless the trial judge has evidently abused his discretion in refusing a motion for a new trial so that a miscarriage of justice is a very probable result, such a refusal will not be reversed by the higher court. *Smith* v. *Bailey* (1874) 26 Oh. St. 1; *Godfrey* v. *Godfrey* (1906) 127 Wis. 47, 106 N. W. 814. The granting of a new trial, as in the principal case, being discretionary, is a favor and not a right. It has been held, therefore, that a new trial can be granted on such conditions as will insure substantial justice to both parties to the suit. *Brenzinger* v. *American Exch. Bank of Duluth* (1900) 19 Ohio C. C. 536; *Fry* v. *Stowers* (1900) 98 Va. 417, 36 S. E. 482. In the principal case, there were special circumstances from which the court as a whole inferred that the perjured witness was under the control of the defendant and had left the state with its connivance, and further it had not been determined by a jury whether the testimony given at the trial was false or whether the subsequent affidavit seemingly made while the witness was under the control of the defendant was false. The fact that § 830 of N. Y. Code of Civ. Proc. does not provide for the admissibility of former testimony in such a

case as the principal one, as a matter of right, does not invalidate the reading of such testimony as a condition for a new trial granted as a favor. Hence, it would seem that the court in the principal case wisely exercised its discretion in the furtherance of justice.

PERPETUITIES — NEW YORK RULE — CONSTRUCTION — SUBSHARES.— The testator devised his estate to trustees, to pay the income to his three children during their mother's life, after which the *corpus* was to be divided equally among them. He then provided: "in case of the decease of either or any of my said children without leaving a lawful issue, then the share of such deceased child or children shall fall into and be a part of the residue of my estate, and the share of the survivor or survivors . . . be proportionately increased thereby." *Held,* this provision did not violate the New York Rule Against Perpetuities, which forbids (N. Y. Real Prop. Law, § 42) the suspension of the absolute power of alienation for longer than two lives in being; that, should two children predecease their mother, the subshare of the child first dying which had enriched the share of the child next dying would not again fall into the trust estate, but pass directly to the survivor. *Central Trust Co.* v. *Falck* (1917) 177 App. Div. 501, 164 N. Y. Supp. 473.

Since the Rule Against Perpetuities is not a rule of construction, but a peremptory command of law, the object of which is to defeat intention, a will is first to be construed as if no rule existed, and the rule then "remorselessly applied". Gray, Rule Against Perpetuities (3rd ed.) § 629. But, if the language is ambiguous, the presumption is that the testator intended to create a valid interest. Gray, *op. cit.,* § 633. While clearly recognizing these principles, see *Gerber's Estate* (1900) 196 Pa. 366, 46 Atl. 497; *Dime Savings Co.* v. *Watson* (1912) 254 Ill. 419, 98 N. E. 777, the courts show a noticeable tendency to construe wills so as to save them from rule, provided this can be accomplished without doing violence to the testator's language. *Henry* v. *Henderson* (1911) 101 Miss. 751, 58 So. 354; *Heisen* v. *Ellis* (1910) 247 Ill. 418, 93 N. E. 362; *Kratz's Appeal* (1897) 180 Pa. 127, 129, 36 Atl. 570. The effect is virtually to make the rule one of construction for ascertaining intention. Indeed, the courts have gone so far as to violate the plain intention of the testator by placing a strained construction upon his language. *St. John* v. *Dann* (1895) 66 Conn. 401, 404, 34 Atl. 110; *cf. Edgerly* v. *Barker* (1891) 66 N. H. 434, 31 Atl. 900. In New York, where the Rule Against Perpetuities is stricter, and often harsher in its operation, this liberal tendency is particularly marked, *Vanderpoel* v. *Loew* (1889) 112 N. Y. 167, 19 N. E. 481, the courts even reading expressions into a will to avoid the rule; *Appell* v. *Appell* (1917) 177 App. Div. 570, 164 N. Y. Supp. 246; while it is a settled principle that, where language is susceptible of two constructions, one of which violates the rule, that which is valid shall be adopted. *Host* v. *Hover* (1865) 33 N. Y. 593. The principal case illustrates this liberal tendency. While the court placed an ingenious interpretation upon the will for the obvious purpose of thwarting the rule, the decision is amply supported by precedent. *Chastain* v. *Tilford* (1910) 138 App. Div. 746, 123 N. Y. Supp. 513, aff'd. 201 N. Y. 538; *Schey* v. *Schey* (1909) 194 N. Y. 368, 87 N. E. 817; but see *Simpson* v. *Trust Co.* (1908) 129 App. Div. 200, 113 N. Y. Supp. 370.